SUPREME COURT, U. S.

SEP 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-541

BARRY BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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3. Petitioner was deprived of Fifth Amendment Due Process of Law by the prosecutor's method of attempting to obtain an in-court identification so as to give rise to a very substantial likelihood of misidentification under *Gilbert v. California*, 388 U.S. 263 (1967), where the in-court identification did not have an independent source but was based on an impermissible in-court suggestion when the prosecutor sequentially (a) showed to the witness the seven photo array, (b) asked the witness to pick out the photo he picked out at the pre-trial photo lineup, and then (c) with the witness having cue-card in hand asked the witness whether the person in the photo was in court, all in the presence of the jury. 16

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Barry Bailey, Petitioner herein, respectfully prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 25, 1973.

OPINION BELOW

The two-sentence opinion of the Fourth Circuit Court of Appeals affirmed the judgment of conviction entered by the

United States District Court for the Baltimore Division of the District of Maryland. Said opinion is reproduced *infra* at Appendix A-3.

JURISDICTION

The order of affirmance of the Fourth Circuit Court of Appeals was entered on June 25, 1973, and is reproduced *infra*, at Appendix A-2, 3. Petitioner's petition for rehearing containing a suggestion for an *En Banc* hearing was denied July 25, 1973, said order of denial being reproduced *infra*, at Appendix A-1. This Court extended the time for filing this Petition until September 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution, 5th Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;" U.S.C.A. Const., Amend. 5.

QUESTIONS PRESENTED FOR REVIEW

Whether a defendent is denied Constitutional Due Process under the Fifth Amendment, when he is convicted of bank robbery *solely* "on resemblence" testimony, where no witness placed him in the bank when he was alleged to be therein, where the "resemblance" testimony possibly placed him at points remote from the bank before and after the robbery, where there was no other evidence of convictable substance, and where there is a substantial liklihood of an irreparable in-court misidentification.

2. Whether Petitioner was deprived of Due Process of Law under the Fifth Amendment, where the pre-arrest

and necessarily pre-trial photographic lineup was so impermissibly suggestive so as to give rise to a very substantial likelihood of an in-court irreparable misidentification under *Simmons v. United States*, 390 U.S. 377 (1968), where Petitioner was the only person in a seven photo lineup who had a heavy mustache and an Afro hairstyle and where no one identified Petitioner at a subsequent corporeal Lineup, *Foster v. California*, 394 U.S. 440 (1969).

3. Whether Bailey was deprived of Fifth Amendment Due Process of Law by the prosecutor's method of attempting to obtain an in-court identification so as to give rise to a very substantial likelihood of misidentification where the in-court identification did not have an independent source but was based on an impermissible in-court suggestion, when the prosecutor sequentially (a) showed to the witness the seven photo array, (b) asked the witness to pick out the photo he picked out from the array and (c) then literally asked the witness whether the person in the photo was in court, all in the presence of the jury.

4. A Court of Appeals may not affirm without opinion where (a) the issues were substantial and nonfrivolous, and (b) where a defendent was convicted on highly questionable "resemblance" identifications whose descriptions of the culprits were inconsistent and irreconcilable.

FACTUAL STATEMENT

On April 4, 1972, approximately 11:45 a.m., a bank in Hyattsville, Maryland, was robbed by four men. Three of them entered the bank and wore disguises. One robber wore a cap and sweater pulled up over his eyes. This robber is alleged to be Petitioner.

There were some 27 people in the bank at this time, 20 customers and 7 employees. Two of the robbers jumped

over the tellers' counters, one of these two allegedly being Petitioner. Although the bank manager was instructed at FBI meetings to remain calm and *observant* if a robbery occurred, he was unable to describe any clothing or facial features of the two countermen, except that one of them had a wig,[1] even though he observed them in, and leaving, the bank.

The three robbers commandeered a cab and drove to the parking lot of an office building several blocks away; whereat, they 'switched' the cab for another car, which car was involved in an accident leaving the 'switch scene.' The accident attracted some residents of the building who observed the tag number of the car and reported same to the police as a hit and run accident. The car was subsequently shown to have a direct connection with the co-defendent below, Arthur Williams.

FBI agents arrived at the bank within 30 minutes. They interviewed about 25 of the bank customers and employers to obtain facial, clothing and other descriptive elements of the robbers. As to the robber alleged to be Petitioner, a generalized composite description assembled from these interviews of people in the bank was:

Unknown Subject, No. 3

Sex	:	Male
Age	:	25-30 years
Height	:	5 ft. 9 in. to 6 ft.
Clothing	:	Wearing a cap, green turtleneck sweater pulled up over nose, gloves.

The composite description *did not* describe - and therefore no witness in the bank described - (1) prominent facial characteristics of Petitioner, to wit, a fairly heavy mustache

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[1] A descriptive element germane to one of the other robbers.

and a medium Afro hairstyle,[1a] and (2) prominent, vivid clothing worn by the robber alleged to be Petitioner, to wit, pink pants and a trench coat described by other witnesses at points remote from the bank.

The FBI agents searched the bank, the surrounding bank grounds, and the switch scene area. The agents did not find any guns, caps, hats, ski masks, gloves, pink pants, green sweaters, trench coat, or other articles of clothing. Found at the switch scene were three beer cans which were never produced at trial, one of which had a single fingerprint on it alleged to be Petitioner's.

From the composite description – and apparently from the strangest of coincidences – the FBI assembled an array of 7 photos which included in the same array, Petitioner and co-defendant Williams, and a third suspect. This photographic lineup, over the next few days, was shown to several dozen people.

Pre-Arrest Photo Lineup

Of the several dozen people who viewed the 7 photo array, only 4 people identified Petitioner in any way, and then only a "resemblance" identification:

William Diggs: and Rossi Wilford:	Both worked at a gas station which was a very long block away from the bank, and made *identical identifications* of Petitioner as *strongly resembling* one of three black men waiting by a bus stop near the gas station 30-45 minutes prior to the robbery. One of the men wore pink trousers,

[1a] Petitioner's mustache and Afro were about the same thickness (a) when arrested about a week after the robbery (b) at the corporeal lineup a month later and (c) at trial.

but Diggs and Wilford put said pink pants on different ones of the 3 men.

David Parker: Identified Petitioner as *resembling* one of two men outside the bank before Parker went into the bank.

Cody King: Identified Petitioner as *strongly resembling* a man he saw running to a car at the 'switch scene' at a time sequence after the bank robbery.

As testified to at trial, each of the above witnesses gave an initial description to the FBI prior to seeing the photos:

	Diggs	Wilford	Parker[2]	King
Race	Negro	Negro		Negro
Sex	Male	Male		Male
Age	Mid-20's	25-30		21-28
Height	6 feet	6 feet		6 feet-one inch
Weight	180 lbs.			180-198 lbs.
Build	Medium	Medium		
Hair				black hair (Afro style)
Attire	Pink pants	(same)		trench coat
	high-heeled boots	(same)		no hat

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[2] Prior to arrest, Parker gave several descriptions of three men who came into the bank, but did not give descriptions of the two men he saw outside the bank. Suffice it to say that he did not describe any of the men outside or inside the bank as having or wearing (a) an Afro hairstyle, (b) mustache, (c) pink pants, or (d) a trench coat.

None of these four witnesses described any of the clothing worn by the robber alleged to be Petitioner - described by the 27 customers and employees inside the bank; to wit, a cap, gloves, and a green turtleneck sweater, *supra*, p. 4.

Petitioner was the only person in the seven photos with a reasonably heavy mustache and a medium Afro hairstyle. At this point, the Justices reviewing this petition are requested to examine a reproduction of the 7-photos included herewith at Appendix A-4, 5. Petitioner is No. 4E in said reproduction.[3]

Not a single one of these four trial witnesses, in their initial interview with the FBI following the robbery, described the robber alleged to be Petitioner as having a mustache and an Afro hairstyle; except King, who described an Afro hairstyle.

None of these four trial witnesses, described the cap and green turtleneck sweater described by persons in the bank.

Not a single one of all of the dozens of witnesses in and out of the bank indicated that any of the 3 robbers wore pink pants and had high-heeled boots (*except Diggs and Wilford who worked together*).

The Corporeal Lineup

In contrast to the 7 photo lineup, the corporeal lineup which was held a month after the robbery, was eminently fair in its composition of participants. Petitioner was No. 8 of 11 participants in the corporeal lineup.

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[3] These photos were admitted as Government trial exhibits 18A - 18G. The reproduction in the Appendix was produced by making negatives from the original evidence and reproducing the photos with as near as possible the same contrast as the originals.

In addition to Petitioner having a substantial mustache and Afro hairstyle, 3 other participants in the lineup had heavy mustaches and Afro hairstyles, to wit, Nos. 1, 5, and 7, as well as others having Afro hairstyles, to wit, 9 and 10. The Justices are requested to examine a reproduction of a photo of the corporeal lineup, included herewith at Appendix A-6.[4]

19 people, including Diggs and Wilford, viewed the actual corporeal lineup and 7 others later viewed the photo of the lineup (See Appendix A-6) in an attempt to make identifications in connection with the bank robbery. Except for Diggs and Wilford, most of these 26 people were either bank employees or customers in the bank at the time of the robbery.

When faced with a fair lineup containing 4 participants with reasonably heavy mustaches, medium Afro hairstyles, and 2 others with medium Afro hairstyles: *NOT A SINGLE ONE OF THESE 26 PEOPLE IDENTIFIED PETITIONER IN ANY WAY WHATSOEVER - NOT EVEN A WEAK 'RESEMBLANCE.'*

Thus, these 26 people, who were at or near the bank scene and either attended the corporeal lineup or viewed the corporeal lineup photograph, were unable to identify Petitioner in anyway whatsoever, when confronted with a fair lineup having several people similar in appearance to Petitioner. Compare this to the 7 photo array in which Petitioner was the only person with a heavy mustache and Afro hairstyle.

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[4] This photo was government trial exhibit 22. The reproduction was reproduced in the same manner as the seven photo array, see *supra*, fn. 3.

In-Court Identification

Not a single trial witness positively identified Petitioner as a participant in the robbery.

Not a single trial witness identified Petitioner in any way as being in the bank.

Of the four people who identified Bailey at trial, *all four had previously failed to identify him at either the lineup or from the photo of the corporeal lineup.* Three of these five trial witnesses, Diggs, Wilford, and King, previously made a 'resemblance' identification of Petitioner from the 7 photo array (*supra,* pages 5, 6.) Parker made no trial identification of any type.

Other Evidence

The only evidence the government had over and above the 'resemblance' identifications was a single fingerprint found on one of three beer cans allegedly found at the switch scene some 5 blocks or so away from the bank. This fingerprint was identified as Petitioner's. None of the 3 cans were produced at trial, and the FBI had no idea where they were.

Exculpatory Evidence

Government's Case: The FBI verified that Petitioner was employed by Ronald Kelly Construction Company, and worked the day of the robbery. The government called as its witness, Petitioner's employer, who produced his time records, which revealed Petitioner was on the job at the time of the robbery and that Petitioner indeed worked a full and normal day on the day of the robbery.

Petitioner's Case: Petitioner's wife testified she saw her husband walk towards his job in the morning. His sister testified that he had lunch frequently at her house, a

couple of blocks from the job site, and specifically did so on the day of the robbery.

Petitioner's Status: Petitioner is presently incarcerated at a Federal penitentiary serving a 22-year sentence imposed by the District Court on October 27, 1972.

REASONS FOR GRANTING THE WRIT

FIRST

Petitioner Was Denied Constitutional Due Process of Law When He Was Convicted Solely on "Resemblance" Testimony.

There does not appear to be any Supreme Court holding on convictions obtained solely on "resemblance" identifications in criminal cases. The only significant Court of Appeals case is *United States v. Brooks,* 146 U.S. App. D.C. 1, 449 F.2d 1077 (1971). Yet the Fourth Circuit Court of Appeals wrote no opinion on this novel question.[5]

In *Brooks,* the accused was convicted on stabbing a woman to death on a Washington, D.C. street. No witness saw the actual crime, but there was a continuous chase of the assailant from a few moments after the crime for a substantial time period thereafter. The assailant eluded his pursuers, but was arrested 12 days later. Three

[5] The order issued by the Court of Appeals, See A-2, 3, contains a two-sentence conclusion, which we do not consider an opinion. The first sentence was germane only to a question raised by the co-defendant below, and the second sentence merely parrotted a legal conclusion on identification which was applied to both defendants. In all candor, the identification issue raised by the co-defendant was not meritorious and consumed only 1/2 page of his appeal brief, and 2 people at the bank made positive identifications.

witnesses involved in the chase gave "resemblance" identification testimony and a fourth witness gave "positive" identification testimony. All four gave consistent descriptions of the assailant and his clothing and his physical condition,[6] which descriptions where consistent with witnesses who knew the accused and saw him immediately before and after the chase.

Judge Leventhal, for the Court of Appeals, District of Columbia Circuit, in *Brooks, supra,* on the "resemblance" issue stated:

> ". . . Where the surrounding facts and evidence do not present a case of substantial doubt as to the possibility of a misidentification, where there is an *untainted [positive] identification testimony,* where there is *strong evidence independent of the testimony of resemblance witnesses* showing that defendant was the offender, that combination of strengths in the Government case and weakness of the "resemblance" testimony in contributing to his conviction warrants a finding of harmless error from admission of the resemblance testimony." (146 U.S. App. D.C. 1, 7, 449 F.2d 1077, 1083) (emphasis added).

Such was not the case herein; in Petitioner's case:

(a) There was a substantial possibility of misidentification,
(b) There were no positive identifications,

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[6] After the chase, the accused's landlady testified his clothing was torn and his hands were cut.

(c) There was no strong and overwhelming independent evidence, to wit, the continuance chain of observations along with consistent descriptions as in *Brooks, supra.*

There was a substantial possibility of irreparable misidentification in this case, see "Reason Second," *infra,* p. 13.

As set forth in the Factual Statement, there were no "positive" identifications placing Petitioner in the bank or any place else.

The prosecutor, without the "resemblance" identifications, did not have an overwhelming or strong case; rather it had no case.[7] In Petitioner's case, there was no chase at all. And the clothing descriptions of the people in the bank were inconsistent and irrenconciliable with those of the people at the gas station and parking lot which were inconsistent and irreconcilable with each other, *supra,* pp. 4, 6. Failure to give an accurate description is recognized as casting doubt on an identification. *United States v. Sanders,* ___U.S. App. D.C. ___, ___F.2d ___, No. 72-1534 (May 17, 1973), *United States v. Harris,* ___U.S. App. D.C. ___, ___ F.2d ___, No. 71-14818 (February 5, 1973).

Resemblance testimony does *not* prove identity. It merely proves resemblance. Webster's Seventh New Collegiate Dictionary (1971) defines "identification" as "an act of identifying"; and defines "identify" as "to establish the identity"; and defines "identity" as "the condition of being the same with something described or asserted." Similarly, Encyclopedic Law Dictionary (1922) defines "identification" as "the establishment of identity" and defines "identity" as "sameness; the state of being the same

[7] The single fingerprint found on one of three beer cans had no convictable substance standing by itself. No one saw the can in Petitioner's hand, no one saw him put the can in the parking lot. There was no evidence of when and how the can got in the parking lot.

as something described; the fact that a person or thing is the same as it is represented or charged to be."

In *Brooks, supra,* both the Court and Government recognized and understood the vital distinction between testimony as to "resemblance" and as to "identification," respectively. The Government there contended that witnesses who testified that a defendant "resembled" the culprit did *not* "identify" him. Agreeing in principle, the court said that:

> "resemblance" testimony projects some uncertainty of the part of the witness . . . The fact that a witness can testify only as to "resemblance" may be taken into account.

Accordingly, the Government perverts language when it twists the words "resemblance" so as to mean the word "identify" in relation to the photographic viewing and trial testimony herein.

Since there was no positive identification herein, and no other evidence of convictable substance, Petitioner was denied constitutional Due Process of Law when convicted solely on "resemblance" testimony.

SECOND

The Composition Of The 7 Photographs Used As An Array For Pre-Arrest Attempts At Identification, Was So Impermissibly Suggestive So As To Give Rise To A Very Substantial Likelihood Of Irreparable Misidentification Under Simmons v. United States, 390 U.S. 377 (1968).

The identification of Petitioner as "resembling" someone near the switch scene, before and after the robbery, was highly improper. Petitioner's photo (See Appendix A-4-E) was the only one depicting a person with a substantial moustache, and an Afro hairstyle. The marked

disparity in appearance of Petitioner, *vis-a-vis* the other 6 photos brought him into very sharp focus as if he had a unicorn.

Such focusing is fatally defective under *Simmons v. United States*, 390 U.S. 337 (1967). Justice Harlan speaking for the Court said:

> "This danger [incorrect identification] will be increased if the police display to the witness only the *picture of a single individual* who generally *resembles the person* he saw, or if they show him the pictures of several persons among which *the photograph of a single such individual* recurs or *is in some way emphasized.*" 390 U.S. at 383, (emphasis added).

A person viewing the 7 photo array herein, (see Appendix A-4, 5) would immediately focus on photo A-4-E, Petitioner's photo, because of the distinctive characteristics he has that the persons in the other photos do not have. So, if the person at the bus stop and switch scene, (or it quite likely was 2 or 3 different persons not known to each other), looked anything like Petitioner, each of the witnesses (Diggs, Wilford, Parker, and King) would probably pick out Petitioner's photo as closest resembling that person(s). From then on, these four witnesses did not retain in their memory the image of the person they saw, but supplanted it with the image of Petitioner in the photo. A phenomena which the Simmons Court recognized:

> Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification (390 U.S. 377, 384).

The clinching evidence of the *Simmons* phenomena in this case is the results of the corporeal lineup. When confronted with a fair lineup, either corporeal or the photo of the lineup, in which the participants were reasonably similar in height and physique, and four[8] had both substantial moustaches and six[9] had medium Afro hairstyles, no one, including the 4 "resemblance" witnesses, identified Petitioner in any way. That a corporeal lineup is normally more accurate than a photo array is recognized by the *Simmons* case.[10] Thus it is patent that all of the "resemblance" identifications from the photo array were based on the manner in which Petitioner's photo was emphasized. *Simmons, supra,* 390 U.S. at 383.

Fundamental requirements of fairness of composition applicable to corporeal lineups must necessarily be requirements of photo arrays. *Foster v. California,* 394 U.S. 440 (1969) is controlling. In *Foster,* a lineup was held to be impermissibly suggestive where the defendant was conspicuous because of his height. 394 U.S. 442, 443. In *Mendoza-Acosta v. United States,* 139 U.S. App. D.C. 143, 430 F.2d 516 (1970), the Circuit Court had no doubt that a lineup was impermissibly suggestive where the defendant was the only lineup participant with a moustache.

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[8] See A-6, participants 1, 5, 7 and 8, No. 8 being Petitioner.

[9] See A-6 participants 1, 5, 7, 8, 9, and 10.

[10] See fn. 6, 390 U.S. 383, 386.

The suggestive elements of the 7 photo array herein, made it all but inevitable that any of the dozens of witnesses who saw a black man with a moustache and Afro hairstyle, would pick out Petitioner's photo as "resembling" that man because of the moustache and Afro, whether or not he was in fact "the man". *Foster, supra,* 394 U.S. 343. These witnesses from then on retained in their memory "the image of the photograph rather than of the person actually seen, reducing the trustworthiness of [their] subsequent lineup or courtroom identification . . .". *Simmons, supra,* 390 U.S. 384.

THIRD

The Prosecutor's Method Of Obtaining In-Court Identifications Was Constitutionally Improper

The Factual Statement, *supra,* presents a class of recurring situations fraught with the danger of impermissible suggestion which this Court has not yet adjudicated but which is within the wholesome spirit of *Wade, Gilbert, Stovall* and *Simmons*[11] and the broadly-conceived purpose of the Due-Process clause.

Counsel refers to the circumstance, during the testimony of witness before a jury, where the prosecutor herein either (A) first showed the 7 photo array (A-3, 4) to the witness, then asked the witness to pick out the photo he previously picked out, and then with the witness having his cue-card in hand asked him to identify anyone in court connected with the robbery; or (B) alternatively, first, asked the witness whether he made a prior identification from an array

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[11] *Wade v. United States,* 388 U.S. 218 (1967)
Gilbert v. California, 388 U.S. 263 (1967)
Stovall v. Penna., 388 U.S. 293 (1967)
Simmons v. United States, 390 U.S. 377 (1968)

of photographs and then asked the witness to identify anyone in court connected with the robbery. In either of the two procedures, the prosecutor was permitted to proceed over Petitioner's objection and prior to any challenge by counsel of the in-court identification on cross-examination.

In either situation, the prosecutor put the cart before the horse. He attempted to rehabilitate his witness before challenge or impeachment of the in-court identification, if defense counsel chose to do so. The defense for a variety of strategical reasons in a given case may decide not to challenge an in-court identification on cross-examination; for example where the witness identified someone other than the defendant or the identification is very 'iffy', among other situations. If counsel does not challenge the identification, the prosecutor certainly is not entitled to put in evidence of prior photo or lineup identifications, anymore than a prosecutor can reopen his direct examination if defense counsel decides not to cross-examine any witness who did not hurt his case. Petitioner and co-defendant were for that part of the trial, when the "resemblance" witnesses testified relative to Petitioner, the only two black men in the court and were both seated at counsel table. They are distinctly different in appearance: Petitioner is dark complected, has a mustache and an Afro hairstyle; whereas the co-defendant is light complected, had no mustache and his head was clean shaven.[12]

Thus, the showing of the 7 photo array to some witnesses prior to an attempt at an in-court identification

[12] Petitioner is 4-E, See Appendix A-4. Co-defendant is 4-A.

planted the image of Petitioner's photo (A-4-E) in their minds, and asking other witnesses about their prior identification from the 7 photo array, reminded these witnesses of the person in the photograph they had previously picked out. This amounted to an illegal, impermissible in-court suggestion which irreparably tainted the ensuing in-court identification. Such in-court identification should have been suppressed under *Gilbert, supra.*

FOURTH

The Court of Appeals May Not Affirm Without Opinion Where There Are Substantial Issues And Where Petitioner Was Convicted Solely On Questionable Resemblance Testimony.

When an appellate-court panel affirms without opinion[13] appellant's counsel is greatly disadvantaged. He can hardly explain to his client and both the full court and the Supreme Court, respectively, (a) whether and, if so, to what extent the panel overlooked or misapprehended the facts and the legal points involved in the appeal and (b) whether the panel has departed from and overruled, *sub silentio,* certain established and applicable doctrines.

In a case of this magnitude and of the serious issues raised, counsel respectfully submits that the panel had an obligation to write an opinion informing the counsel, parties, court and profession its *ratio decidendi.* Only if a panel files an opinion, does the full court or the Supreme Court have an adequate basis for considering whether to reverse.

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[13] The Circuit Court's 2 sentence statement was not an opinion, see fn. 5, *supra.*

At no time did the Government or the panel suggest that any issue raised by counsel for petition is frivolous. *Coppedge v. United States,* 369 U.S. 438, 447, 448 (1962). His presentation of the applicable facts and law is full, true, fair and objective. The action of the panel in failing to discuss any issue is tantamount to a dismissal by panel, on its own motion, without a suggestion - much less a "showing" that the points are frivolous.

Counsel submits that on an appeal taken as a matter of right, the panel should not dispose of substantial-non-frivolous issues, unless it files an opinion which describes the points and the reasons for its rejection.

There are at least five reasons for this contention:

1. *Avoidance of Discouragement of Resort to the Appellate Process.* Rule 40 of the Federal Rules of Appellate Procedure reads in pertinent part:

> (a) A petition for rehearing . . . shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present . . .

Rule 19 of the Rules of the Supreme Court says that a review on a write of *certiorari* will be granted "only where there are special and important reasons therefor" and indicates, *inter alia,* the character of reasons which it will consider:

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . .

Petitioner has a right to file and to have the full court consider a petition for rehearing and a suggestion of the appropriateness of a rehearing *en banc.* Petitioner also

has a *right* to file a petition for *certiorari* with the Supreme Court. While the willingness of either court to hear petitioner further is discretionary with each court, the right to file and have his petition given due consideration, exists. That right, however, is subject to the fulfillment of certain requirements. For example, Rule 40, quoted above, requires that the petition for rehearing "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." A petition for *certiorari,* as Rule 19 states, has a much better basis for success when the petitioner can show that "a court of appeals has rendered a decision in conflict with the decisions of another court of appeals on the same matter."

With respect to the issues of his appeal, petitioner can only point to an affirmance of his convictions. Thus, he is heavily burdened to argue that the panel has "overlooked or misapprehended points of law or fact" or has a view of the law in conflict with its own prior rulings or those of another circuit.

2. *Testing the Initial Tentative Decision.* Chief Justice Roger J. Traynor of the Supreme Court of California has written:

> "In sixteen years I have not found a better test for solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day." "The Work of State

Appellate Courts," 24 U. Chicago L.Rev. 211, 219 (1956).

"Internal Operating Procedures of Appellate Couts," at page 20:

"But appellate judges gain not only by the opportunity of examining the opinions in other cases, but also from the discipline of writing opinions in their own cases. A conscientious appellate judge finds that the research, thought and time required to prepare an opinion worthy of publication increase the likelihood that a just result has been reached. Referring to the fruitful effect of such a process, Justice Frankfurter has said: 'You feel much more responsible—all of us do—if we have to sit down and write out why we think what we think.' Likewise, Chief Justice Hughes has pointed out that 'there is no better precaution against judicial mistakes than setting out accurately and adequately the material facts as well as the points to be decided . . . The importance of written opinions as a protection against judicial carelessness and responsibility is very great.' A Report by a Committee of the Section of Judicial Administration of the American Bar Association (1960-61).

3. *The Principles of Stare Decisis.*

Our system of jurisprudence depends importantly upon *stare decisis.* Certain issues raised by petitioner such as conviction based solely on resemblance testimony and tainted-identification procedures, are of growing importance and involve a substantial aspect of the criminal process.

4. *A symbol of Accountability.* Associate Justice George R. Smith in "A Primer of Opinion Writing, for Fourt New Judges," 21 Ark. L.Rev. 197 at 200, which was used for the 12th Annual Session of the New York University Seminar for Appellate Judges, writes:

> WHY AN OPINION AT ALL?
>
> Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, . . .

5. *Information for Litigants.* Petitioner was sentenced to serve 22 years. He should at least be able to read a full discussion of the points raised in his appeal.

> [An opinion] serves to mollify the litigants. It tells them, their counsel, and the court below why the judgment has been affirmed or reversed. It tells the losing party where and why his arguments were in error. It serves that most important function of seeing that the law not only does justice but shows that it does justice. M. Lasky, Observing Appellate Opinions from Below the Bench. 49 Cal. L.Rev. 831, 835 (1961).

The contention that the panel should state its reasons for rejecting petitioner's points is not a novel one. Several states have provisions in their state constitutions requiring the statement of grounds of decisions. For example: Arizona (Art. VI. Sec. 2); California (Art. VI. Sec. 2); Indiana Art. VII. Sec. 5); Maryland (Art. IV. Sec. 15); Ohio (Art. IV. Sec. 6).

WHEREFORE, Petitioner prays that a writ of *certiorari* issue to review the judgment of the Court below.

NICHOLAS A ADDAMS
1707 N Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner,

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2445

United States of America,

Appellee,

v.

Barry Bailey,

Appellant.

ORDER

The petition for rehearing containing a suggestion for rehearing *in banc* has been referred to the panel which decided the case and the entire court. No judge eligible to vote thereon has requested a poll on the suggestion for rehearing *in banc.*

In the absence of Judge Kaufman, it is, with the concurrence of Judge Widener.

ORDERED that said petition be, and it is hereby, denied.

For the Court:

/s/
Harrison L. Winter
United States Circuit Judge

/s/ Filed:
July 25, 1973
William K. Slate II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2444

United States of America,

Appellee,

v.

Arthur Williams,

Appellant.

No. 72-2445

United States of America,

Appellee,

v.

Barry Bailey,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued June 6, 1973 Decided June 25, 1973.

Before WINTER and WIDENER, Circuit Judges, and KAUFMAN, District Judge.

Joseph A. Kenary [Court-appointed counsel] for Appellant in No. 72-2444; Nicholas A Addams for Appellant in No. 72-2445; Paul M. Rosenberg, Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Appellee in Nos. 72-2444 and 72-2445.

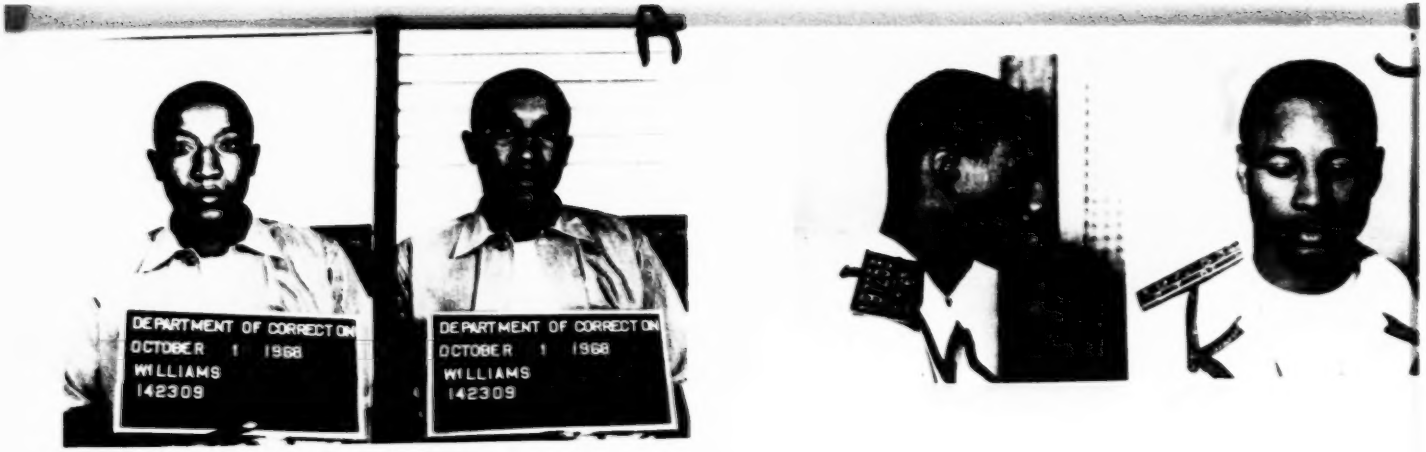
[U.S. Court of Appeals For The Fourth Circuit]

PER CURIAM:

In these appeals, we find no error.

When defense counsel's vigorous cross-examination elicited testimony from Joanne Smith which indicated that a statement she had given previously to the FBI might differ from her testimony at the trial, we think that the district court properly permitted the government to prove the statement to establish that there was in fact no difference. We do not think that the photographic array from which defendants were identified, prior to their arrest, was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification, and we see no other error.

AFFIRMED.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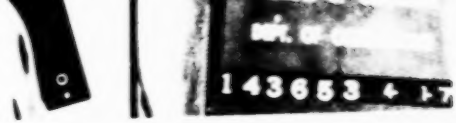
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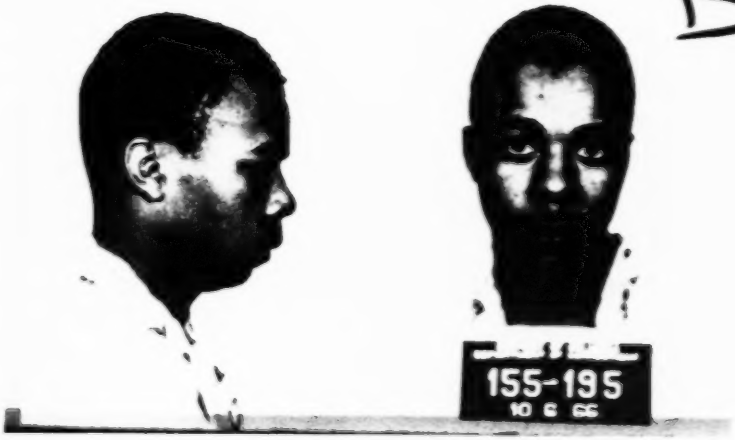
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SUPREME COURT, U. S.

No. 73-541

DEC 5 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BARRY BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

JEROME M. FEIT,
MARC P. RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1973. Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to September 24, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the photographic display presented to witnesses for identification purposes prior to petitioner's arrest was impermissibly suggestive.

2. Whether identification evidence at trial was improperly adduced.

3. Whether the identification evidence was sufficient to sustain the conviction.

4. Whether the court of appeals was required to issue a more detailed opinion.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner and a co-defendant were convicted of bank robbery and assault, in violation of 18 U.S.C. 2113(a), (b), and (d). Petitioner was sentenced to a total of 22 years' imprisonment. The court of appeals affirmed (Pet. App. A2).

The evidence shows that at about 11:45 a.m. on April 4, 1972, the Suburban Trust Company in Riverdale, Maryland, was robbed by three Negro males (T. 437)[1] who disguised their appearances (T. 401-403). They ordered everyone in the bank to get on the floor (T. 402). After three to four minutes they left the bank (T. 407, 413) and made their getaway in a taxicab, which had been commandeered by a fourth individual immediately prior to the holdup (T. 435-437). They took the cab to a parking lot about half a mile from the bank (T. 243-244) and transferred to a silver Cadillac (T. 243, 645). While driving off the parking lot, the Cadillac struck another car, causing a witness to record the license number of the Cadillac (T. 645). The Cadillac was recovered a week later about two blocks from petitioner's home, and the same distance from his place of employment (T. 233, 236-237). The silver Cadillac belonged to Joanne Smith, who testified that on the same date, at about 8:30 a.m.,

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[1] "T." refers to the trial transcript.

petitioner and the co-defendant had borrowed the car (T. 71-72). Later in the morning, the co-defendant called Miss Smith and directed her to report her automobile as stolen (T. 73-74). When she asked the reason, she was told it was none of her business (T. 74). During the conversation, Miss Smith recognized petitioner's voice in the background (T. 89-90).

The evidence connecting petitioner with the bank robbery was adduced in several ways. The jury was asked to compare the physical characteristics of petitioner with those of the bank robbers depicted in films made by surveillance cameras in the bank (T. 223, 230-231) and in still prints made from the films (T. 226). Miss Smith identified petitioner from the still prints (T. 80-85) and said he was wearing the same or a similar cap on the morning of the robbery (T. 85).

Rossie Willford, Jr., an employee at a service station across the street from the bank, positively identified petitioner at trial as one of three men he observed loitering at a bus stop near the bank (T. 495) for about half an hour prior to the robbery (T. 523-524, 525, 529-530). He testified to his prior photographic identification of petitioner (T. 535, 1032-1033)[2] and his inability to identify petitioner at the pre-trial corporeal lineup (T. 526).[3] Howard Isaacs, the driver of the commandeered taxi,

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[2] The spread of seven photographs from which witnesses were asked to choose is depicted at Pet. App. A4, A5 and is discussed below. Apparently, petitioner's photograph was in the spread because of Miss Smith's statements to the police on the day of the robbery.

[3] The lineup is depicted at Pet. App. A6. None of the witnesses was able to pick petitioner out of the lineup. Counsel cross-examined each identification witness on the failure to identify petitioner at the lineup and argued this point to the jury (T. 1227-1228).

testified that petitioner resembled one of the men he saw fleeing the bank (T. 447). He had not been asked to look at the photographic spread, but admitted that he had been unable to identify petitioner at the lineup (T. 449). William Diggs, the proprietor of the service station, made no courtroom identification and testified that he had been unable to make an identification at the lineup. However, he did testify that he had previously identified petitioner from the photographic spread as strongly resembling, perhaps identical to, one of the men loitering at the bus stop (T. 483-486, 1032). Cody King, a witness at the automobile switch scene, was unable to make a courtroom identification (T. 635) and had not attended the lineup. However, he stated that he had identified petitioner from the photographic spread as strongly resembling one of the individuals he saw running to the silver Cadillac (T. 632-634, 642-643). David Parker, a customer in the bank, testified that as he entered the bank he observed two individuals outside who resembled in size and stature two of the bank robbers (T. 556, 560-561). An FBI agent testified that Parker had previously made a photographic identification of petitioner as bearing a resemblance to one of the individuals he observed outside the bank, who entered the bank during the robbery (T. 1033). Parker was unable to make a courtroom identification and stated that he had been unable to identify petitioner from the photograph of the lineup (T. 566-568). Two witnesses from the bank positively identified the co-defendant as one of the robbers (Pet. 10, n. 5). In addition, petitioner's fingerprint was found on a beer can left on the parking lot near where the Cadillac had been parked.

Petitioner's employer, testifying for the government, stated that petitioner had worked the day of the robbery, but that he believed petitioner had gone to lunch

early that day, perhaps at 11 a.m. (T. 368-369). He further acknowledged that it was possible that he had told an FBI agent that he had docked petitioner an hour's pay that day because he had taken extra time for lunch (T. 371). He also testified that petitioner had arrived at work that day at 8 or 8:30 a.m., but admitted he might have told the prosecutor previously that petitioner's arrival had been at about 9 a.m. (leaving enough time to drive to work from Miss Smith's house) (T. 378-381).

Petitioner did not testify. His statement to the FBI that he had left work at about 12:15 p.m., at lunch at home, and returned to work at 1:00 p.m. was introduced at trial (T. 984-985). Petitioner's wife testified in accord with this statement (T. 1109, 1118). However, evidence was introduced that she had previously told the FBI that she had not seen her husband during the day of the robbery (T. 1144-1145). Petitioner's sister contradicted both petitioner and his wife, stating that petitioner had eaten lunch at her house that day (T. 1121).

ARGUMENT

1. Petitioner contends that the pre-arrest photographic identification procedure was so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." quoting *Simmons* v. *United States*, 390 U.S. 377, 378. Specifically, he contends that his photograph stood out from among the rest. However, an examination of the photographic spread shown to the witnesses (Pet. App. A4, A5) reveals that all seven were medium to dark complexioned Negro men, three had medium length "natural" hair (photographs D, E, and G), and two had mustaches (photographs B and E). Although it is true that petitioner's hair is a little longer and his mustache thicker than the others, it cannot be

said that petitioner's photograph (E) was "in some way emphasized," *Simmons, supra,* 390 U.S. at 383, or that the police were, in effect, saying "This is the man," *Foster* v. *California,* 394 U.S. 440, 443.[4] The trial court ruled that the procedure did not violate petitioner's rights (T. 360), and the court of appeals agreed. The issue does not require further review.

2. There was no defect in the identification procedure at trial.

a. Petitioner claims that the method used by the prosecutor to examine identification witnesses was improper. In the case of witness Diggs, the prosecutor asked him to choose the photograph he had previously selected from the photographic spread and, after he did so, asked him if he recognized anyone in the courtroom. Diggs stated that petitioner resembled the man in the photograph he had chosen, but he could not state that petitioner resembled any of the men he had seen at the bus stop (T. 483-486). In other circumstances, the procedure of asking a witness at trial to take another look at a photographic spread from which he had previously picked the defendant, and then asking him to identify the defendant in court, might be improperly suggestive.

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[4] Petitioner's reliance (Pet. 15) on *Foster* v. *California,* 394 U.S. 440, and *Mendoza-Acosta* v. *United States,* 430 F. 2d 516 (C.A.D.C.), is misplaced. In *Foster,* although the defendant was about six feet tall and wearing a leather jacket similar to the one worn by the robber and was placed in a lineup with two men, both about five and a half feet tall, the witness only "thought" he was the man, but was not sure. After a one-to-one confrontation he still was not certain. A second lineup was held, in which only the defendant was a repeat from the first lineup. In suppressing the now positive identification, the Court stated that the effect of the repetition was to tell the witness that this was the man to identify. In *Mendoza-Acosta,* the defendant was the only Mexican with a mustache in a lineup with three Anglo-Saxon looking men.

Here, however, the procedure did not prejudice the petitioner, since it did not result in a courtroom identification. Thereafter, because of counsel's objections, the prosecutor did not ask any other witness to look through the photographic spread until the witness had attempted a courtroom identification, although he did ask about the fact of their having made a prior identification. After the witness had attempted a courtroom identification, he was questioned about the prior photographic identification. There was nothing unduly suggestive about this latter procedure.

b. Petitioner claims that the prior photographic identifications were not admissible, at least not as part of the government's case-in-chief. However, prior identifications are admissible on direct examination not only to corroborate a courtroom identification, but as independent evidence, whether or not there has been a courtroom identification. See *Gilbert* v. *California,* 388 U.S. 263, 272 n. 3; *United States* v. *Sacasas,* 381 F. 2d 451 (C.A. 2). The witnesses were subjected to cross-examination, and counsel argued the identification to the jury (T. 1227-1228, 1237-1238, 1240-1242, 1247).

3. Petitioner contends that the identification evidence was insufficient to sustain the conviction. There were six identification witnesses,[5] as well as the robbery film

[5] Although four of the identification witnesses were only able to testify as to resemblance, such evidence is admissible and may be considered by the jury to constitute a basis for a guilty verdict. *United States* v. *Brooks,* 449 F. 2d 1077 (C.A. D.C.). In the portion of the opinion in *Brooks* cited by petitioner (Pet. 11), the court was discussing its holding that, assuming the resemblance evidence was tainted by a pretrial confrontation, the admission was harmless due to other evidence in the case.

It is not surprising that there were few positive identifications in this case, since the robbers were disguised and ordered the people in the bank to lie on the floor. Even so, courtroom identifications by Miss Smith and Mr. Willford, as well as the prior identification by Mr. Diggs, were positive.

and the fingerprint on the beer can, from which the jury could draw its conclusion that petitioner was one of the bank robbers. The testimony of Diggs and Willford placed petitioner at the bus stop near the bank just prior to the robbery, and Parker placed petitioner outside the bank just before the robbery. Parker also placed petitioner inside the bank during the robbery, as did Miss Smith. The jury could draw its own conclusions from viewing the films and stills of the robbery. Isaacs saw petitioner fleeing the bank; King and the fingerprint placed petitioner at the automobile switch scene. Miss Smith placed petitioner with the co-defendant both before and after the robbery, and the co-defendant was positively identified by two bank witnesses. The abandoned automobile was found two blocks from petitioner's residence and his place of employment. Viewed in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, there was sufficient evidence to sustain the identification of petitioner as one of the men who robbed the bank.

4. Petitioner claims that the court of appeals had the obligation to write an opinion giving its *ratio decidendi.* Contrary to petitioner's suggestion (Pet. 18 n. 13), the court of appeals did specifically address itself, albeit briefly, to two of the issues raised below. Moreover, the courts of appeals have wide latitude in their decision whether or how to write opinions. *Taylor* v. *McKeithen,* 407 U.S. 191. See *United States* v. *Coefield,* 476 F. 2d 1152, 1163 n. 2 (C.A. D.C.). The increase in the caseloads of courts of appeals has led the courts to dispense altogether with writing opinions in certain cases. See *N.L.R.B.* v. *Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L. 990,* 430 F. 2d 966 (C.A. 5). The court of appeals did not act improperly in writing a brief opinion dealing with only two of the issues raised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
MARC P. RICHMAN,
Attorneys.

DECEMBER 1973.

DOJ-1973-12

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IN THE

Supreme Court of the United States

No. 73-541

BARRY BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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January 2, 1974

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

No. 73-541

BARRY BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of *Certiorari* to
The United States Court of Appeals for
The District of Columbia Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Respondent's brief in opposition to the petition for *certiorari* failed to address itself head-on to the crucial constitutional issue raised by petitioner; to wit,

> whether the Petitioner's conviction – which was based on trial evidence comprising "resemblance testimony" placing him at points remote from the scene of the crime, when not a single trial

witness or other evidence put him at the scene of the crime – was constitutionally proper.

Respondent skirts this vital issue by distorting and manipulating the trial evidence, and it is only for this reason that this Reply is necessary.

* * *

Trial Identification Witnesses

The government's brief mixed pre-trial evidence with trial evidence in an attempt to dispel Petitioner's contention that:

(a) not a single *trial* witness placed petitioner in the bank or outside the bank,[1] and

(b) the 4 witnesses, who testified that Petitioner resembled someone at the bus stop or at the car switch scene, failed to identify Petitioner in any way at the corporeal line-up or from the photo of said line-up.

The government argues that Miss Smith identified Petitioner from the photos taken in the bank during the robbery

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[1] The government incorrectly asserts that Howard Issacs "*saw* petitioner fleeing from the bank." (Respondent brief, p. 8). The record shows Issacs *found a resemblance* between petitioner and the fleeing robber (Tr. 447). However, this testimony must be rejected since Issacs also said petitioner had "a black leather jacket and wore a ski mask" (Tr. 450, 453). The black jacket was worn by one of the other robbers alleged to be the co-defendant, and since the fleeing robber wore a ski mask Issacs could not see his face to make an identification; hence, the vague "resemblance". Issacs made no identification of any kind at the corporeal line-up and did not view the photographic array. Hence, he was a surprise witness for the government.

and from hearing his voice in the background during a phone call made to her by the co-defendant. (Gov. Brief, p. 5, 8).

The government failed to tell the Court, that Miss Smith hardly knew Petitioner and that she only saw Petitioner very briefly a couple of times during the 6 months prior to the robbery. On these occasions Petitioner did not talk to her, except to say "hi" as he went out the door of his apartment, where she was going to visit Petitioner's wife's new baby. (Tr. 89, 90). Her own testimony destroyed any credibility to the alleged voice identification.

We submit that the film taken in the bank during the robbery and the selected stills therefrom admitted in evidence were extremely fuzzy and distorted. Further, the person alleged to be Petitioner wore a peaked-cap pulled down to his eyes and a turtleneck sweater pulled up over his nose, and the only views of this person were mostly from the side or three-quarters to the rear.[2] We defy government counsel, or anyone else, to recognize even his own father in these photos in view of the disguise and the poor quality of the photos. Hence, Smith's testimony has absolutely no convictable merit, and this counsel finds it incredible that the government offers it as such.

One last point regarding Miss Smith. The government asserts that Petitioner and co-defendant borrowed her car that morning (Gov. Brief, p. 3). The record is unequivocal

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[2] The government suggests that none of the 26 people in the bank during the robbery, and who viewed the photo array and/or attended the corporeal line-up and/or saw the photo thereof, were unable to make any identification whatsoever because of the disguise. Yet, it has the temerity to advocate that Smith, who was not in bank, could make an identification from the bank photos.

that the co-defendant borrowed the car and that she had no conversation with Petitioner (Tr. 71, 73).

The government asserts that Parker, while unable to identify Petitioner *in court* or from the line-up photo *in court*, nevertheless prior to trial said to an FBI agent that Petitioner bore a resemblance to someone he saw outside the bank, but he could not say that this person entered the bank. The simple reply is, that this pre-trial statement was not before the jury and does not bear on Petitioner's contention that there was no trial evidence which placed him at the scene of the bank, resemblance or otherwise.

The government asserts that "[I]t is not surprising that there were few positive identifications . . ." referring to Wilford, Smith and Diggs. (Government Brief, p. 7, fn. 5). The fact is there were no positive -- or even resemblance – identifications placing Petitioner at the scene of the crime, and only a single, suspicious identification (by Wilford) placing Petitioner at a corner by a gas station more than a block from the bank and over a half hour before the robbery. The Smith identification was physically impossible and borders on perjury, *supra*. And, Diggs did not make an in court identification.

Regarding the pre-arrest photo array (see Petitioner's exhibit A 4, 5, Appendix to the Petition), the only thing common to the 7 photos comprising the array is that all the photos are of black men. Petitioner (A 4, 5, photo E) is the only person with a heavy mustache and a medium-length, afro hairstyle. These features emphasized him in the array, and, of course if one of the robbers had such features, Petitioner's photo would "resemble" that robber.

* * *

Thus, the petition survives the attack made in the government's brief, and the issue of "whether a defendant can be convicted solely on resemblance testimony" survives.

CONCLUSION

The respondents' own brief demonstrates the extent and substantiality of the questions presented by this case. The petition for *certiorari* should be granted.

Respectfully submitted,

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